

**Kante v Westside Livery Stable, Inc.**

2015 NY Slip Op 30579(U)

March 27, 2015

Sup Ct, Bronx County

Docket Number: 302321/13

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----X **Index No. 303623/11**  
Drissa Kante, **Action No. 1**  
Plaintiff,

-against-

**DECISION and ORDER**

Westside Livery Stable, Inc., Franca  
Gasperetti and "JOHN DOE," name being  
fictitious person intended being the operator  
of the horseless cab,

Present:

Defendants. Hon. Julia I. Rodriguez  
-----X Supreme Court Justice  
Drissa Kante,  
Plaintiff,

-against-

**Index No. 302321/13**  
**Action No. 2**

Martin Dennehy and Sean Dennehy,  
  
Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of the summary judgment motion of  
Def. Westside Livery Stable, Inc., Franca Gasperetti, Martin Dennehy and Sean Dennehy ("Defendants").

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Def. Memorandum of Law	2
Pls.' Affirmation in Opposition & Exhibits	3
Reply Affirmation	4

The instant actions, which have been consolidated for trial, arise out of an accident involving the Plaintiff, a pedestrian, who was allegedly struck by a 1,000 pound horse carriage, owned by Sean Dennehy ("Sean"), that was being pulled out of premises owned or operated by Westside Livery Stable, Inc., ("Westside"), across Westside's sloped sidewalk and into the street by Martin Dennehy ("Martin"). Franca Gasperetti is one of the principals of Westside. In the complaints, Plaintiff alleges, *inter alia*, that the accident and his resulting injuries were caused

by the negligence of the defendants, their agents, servants and/or employees in removing a horse carriage from the premises and moving it onto the sidewalk and street.

Defendants move for summary judgment, pursuant to CPLR §3212, dismissing the complaints in Action No. 1 and Action No. 2 on the grounds that: (1) Martin was not negligent, (2) Plaintiff was the sole cause of the accident, (3) Westside cannot be held liable for the actions of the Dennehy's as the Dennehy's were not employees of Westside and Westside provided no direction to Martin with regard to the manner in which he pulled out the carriage, and (4) Franca Gasperetti cannot be held individually liable for the alleged torts of the corporation (Westside) and cannot be held liable for the actions of the Dennehy's, over whom she possessed no supervisory capacity.

In opposition to the motion, Plaintiff argues that: (1) Defendants failed to meet their initial burden, (2) issues of fact exist as to how the accident happened, (3) Westside and Gasperetti owed a duty to the Plaintiff, and (4) Westside's use of the sidewalk constitutes a "special use."<sup>1</sup>

In support of the motion, Defendants submitted, *inter alia*, the affidavit and deposition testimony of Martin Dennehy, the deposition testimony of Luiz Pinto and portions of the deposition testimony of Michele Angelucci. In his affidavit, Martin states that on August 30, 2010, the date of the accident, "it was [his] job to guide a carriage owned by [his] brother, Sean Dennehy, around Central Park." At that time, Martin states, Sean rented a carriage storage space and a stable for his horse from Westside. According to Martin, neither Sean nor he were employees of Westside and neither "Gasperetti nor anyone from Westside directed [him] as to the manner in which [he] removed Sean's . . . carriage on the morning of the incident." Martin adds that Sean was not present at the premises on the date of the accident. At his deposition,

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<sup>1</sup>The court will not consider Plaintiff's theory of liability based on the "special use" of the sidewalk as it was raised for the first time in opposition to Defendants' summary judgment motion. *Abalola v. Flower Hosp.*, 44 A.D.3d 522, 843 N.Y.S.2d 615 (1<sup>st</sup> Dept. 2007); *Pinn v. Baker's Variety*, 32 A.D.3d 363, 820 N.Y.S.2d 129 (2<sup>nd</sup> Dept. 2006); *Scanlon v. Stuyvesant Plaza*, 195 A.D.2d 854, 600 N.Y.S.2d 810 (3<sup>rd</sup> Dept. 1993).

Martin testified that on the morning of the accident, at about 9:30 a.m., Plaintiff was running in the street from East to West along 38<sup>th</sup> Street, toward the premises [pg. 15]. As Plaintiff approached the premises, Martin was in the process of bringing his brother's carriage out of the premises to the street in order to load a horse [pgs. 16, 28-30]. One of the "stablemen," a man named Ernesto who is "in the stable every day," was helping him bring the carriage out from the stable [pgs. 21-24]. While Martin was "pulling" the carriage out, Ernesto "was at the back of the carriage holding onto the carriage . . . as a precaution . . . [s]o the carriage wouldn't roll out on [him]" [pg. 24]. Martin used the two shafts, which project about five feet out from both sides of the front of the carriage, to pull the carriage out of the stable. [pg. 25-26]. Upon reaching the doorway, he stopped and looked both ways up and down the sidewalk [pgs. 33-34]. He did not see any oncoming pedestrians on the sidewalk [pg. 34]. He was standing in between the shafts when he pulled the carriage out onto the sidewalk and onto the street [pgs. 27-28]. At that time, Michele Angelucci, another carriage driver, was standing in the middle of 38th street, "stopping traffic and warning anyone in the vicinity of the area that a carriage is about to come out" [pgs. 29, 31]. Upon receiving a signal from Angelucci that it was safe to pull the carriage out into the street, Martin proceeded to bring the carriage through the doorway, onto the sidewalk and into the street [pgs. 36-37]. Martin does not remember if Ernesto was still behind the carriage when the carriage passed beyond the curb into the street [pg. 39]. He saw the Plaintiff a "split second" before the collision [pg. 41]. Prior to the accident, Plaintiff was running in the middle of the street "coming from [Martin's] right" [pg. 41]. Martin tried to stop the carriage but could not; the carriage was moving at about two miles per hour at the time of the accident [pg. 43]. Martin did not say anything to the Plaintiff prior to the collision [pg. 44-45] but Angelucci yelled 'stop' or 'wait' [pgs. 45]. After that, Plaintiff continued to run and "screamed into [Martin's] face you wait for me" [pg. 45]. At that time, Plaintiff was about two yards from the carriage [pg. 46]. Plaintiff ran around the carriage and in between the shafts "to meet" Martin then Plaintiff's chest made contact with Martin's chest [pgs. 47- 48]. After that contact, Plaintiff "stumbled backwards," put his hand out "to break his fall" then fell to the ground on the street. [pgs. 49-50]. Someone from a nearby car garage called an ambulance. [pg. 54].

At his deposition, Angelucci testified that, as Martin pulled the carriage out of the stable, he was standing in the street to stop oncoming traffic [pg. 25]. Angelucci is not an employee of Westside but uses the stable to store his horse and carriage [pg. 14]. The impact between Plaintiff and Martin was not a hard impact [pg. 32]. “He was just walking and the impact was, like, when he tried to stop he hugged him and both went in slow motion down, boom” [pg. 32]. Stablemen Carlos and Ernesto were working on the date of the accident [pg. 26]. The stablemen are employed by Westside [pg. 26]. At the time of the accident, Angelucci was looking “for the traffic” [pg. 27]. When he heard “screaming start,” he turned around and saw the accident happen [pg. 27]. He heard “stop” and turned around [pg. 27].

At his deposition, Pinto testified that he is employed by Westside as a driver [pg. 8-9]. No one at Westside has any supervisory responsibility to watch over the removal of carriages from the stable to make sure it’s done in any particular fashion [pg. 42]. Pinto witnessed the accident [pg. 43]. When he first saw Plaintiff, Plaintiff was walking “at a normal pace,” westbound on the street, a “foot or two” away from the curb near the stable [pg. 44-45]. The carriages weigh 800 to 1000 pounds [pg. 48]. Immediately before the accident, there were “three or four guys” on the sidewalk “watching the whole thing” [pg. 50]. One of those guys said “can you hold one second” to Plaintiff [pg. 50]. Plaintiff responded by saying “you got to wait for me” [pg. 52]. Plaintiff made contact with the right shaft with “[a]lmost no intensity” [pg. 54]. As a result of the contact, Plaintiff fell backwards to the ground on the roadway hitting his buttocks, back and head [pg. 55]. Plaintiff remained lying on his back on the ground for ten to fifteen minutes after he fell until the fire department arrived [pg. 60].

In opposition to the motion, Plaintiff submitted his deposition testimony and affidavit, with attached photos, the complete deposition testimony of Angelucci, and the first two pages of a four-page Recording and Endorsement Cover Page referencing the Deed for the subject property.

At the outset, the Court rejects Plaintiff’s contention that Defendants failed to meet their *prima facie* burden merely because they did not submit Plaintiff’s deposition testimony as they

are not required to submit every deposition transcript in support of their summary judgment motion.

In his affidavit, Plaintiff states that on the date of the accident he “was walking on the sidewalk on 38<sup>th</sup> Street between 10<sup>th</sup> and 11<sup>th</sup> Avenue when [he] was suddenly hit on [his] left side by a large horse carriage that was being pulled across the sidewalk.” Plaintiff states that the impact “knocked [him] into the street.” Also, Plaintiff states that “[t]here was nobody standing in the area to warn [him] of the carriage coming out of the building, and there was no sign of any kind to warn [him] that horse carriages were crossing the sidewalk in that area.” Plaintiff further states that he struck his head on the ground and “lost consciousness” and “woke up” in an ambulance. Two of the photos depict the entrance to the subject premises with the door in an open position and a “driveway” within the sidewalk which slopes downward to the street. The third photo depicts a parked, four-wheeled horse carriage with the shafts pointed upward.

At his deposition, Plaintiff testified that when he was walking on the sidewalk on the “left side” of 38<sup>th</sup> Street from 11<sup>th</sup> towards 10<sup>th</sup> Avenue and he “was crossing the door . . . they was pushing the horse carriage out and it hit me from my left side” [pg. 12,16]. Prior to the accident, he did not see or hear anything near the stable [pg. 17]. He was hit by the “handle in the front of the carriage” [pg. 18-19]. The impact was “very heavy” and he fell from the sidewalk to the ground in the middle of the street. [pg. 19]. He fell on his right side [pg. 19]. After he was hit, he tried to get up but could not and fell down again and lost consciousness [pg. 21]. He “woke up” in the ambulance [pg. 21].

Plaintiff also points to Pinto’s deposition testimony, submitted by Defendants, that, on the date of the accident, no one was standing on the sidewalk to address any pedestrian traffic near the subject premises [pg. 47]. Pinto also testified that the person standing in the street to watch for traffic does not have any type of sign, traffic cone or clothing that might make him more visible or indicate that vehicles should slow down [pg. 31- 32]. Plaintiff also points to Pinto’s testimony that, prior to contact, Plaintiff was walking at a normal pace in the street to the right of a carriage that was already parked along the curb and looking in the same direction as he was walking [pg. 43- 44, 45].

At his deposition, Angelucci testified that as soon as you exit the stable the sidewalk slants downward [pg. 30]. Immediately prior to the accident, Martin's carriage started rolling down the sidewalk and, unable to stop it, Martin fell on top of Plaintiff while Angelucci and others held the carriage so that it would not fall on top of them [pg. 30]. Angelucci also testified that there are no rules or regulations in place as to how to remove the horse carriages from the stable.

The Recording and Endorsement Cover Page indicates that the Deed to the subject premises was transferred from Antonia Spina to Franca Gasperetti on January 10, 2003.

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

Based on the conflicting versions of how the accident occurred, at a minimum, issues of fact exist as to the negligence, if any, of plaintiff, Martin, Ernesto and Angelucci, and whether Sean may be held liable under the doctrine of *respondeat superior*. Also, as Ernesto was employed by Westside, issues of fact exist as to Westside's negligence. Further, issues of fact exist as to whether Franca Gasperetti owned the premises at the time of the accident and had a duty to warn pedestrians of the horse carriage traffic across the sidewalk.

Upon the foregoing, Defendants' motion is denied in its entirety.

Dated: 3/27/2015

  
Hon. Julia I. Rodriguez